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Harry H. Ognall

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SOME FACETS OF STRICT TORTIOUS LIABILITY
IN THE UNITED STATES AND THEIR IMPLICATIONS

*Harry H. Ognall**

INTRODUCTION

Liability in the absence of fault is no novelty to the common law.¹ From the year 1868, and the final decision in *Rylands v. Fletcher*,² this doctrine has been much discussed by legal theorists on both sides of the Atlantic. Even students of the civil law have taken part in the ventilation.³ Nevertheless, it seems fair to say that much wearisome repetition has not dulled the edge of controversy. One may note that consideration of the subject immediately brings forth divergent views as to terminology; some writers believe that inasmuch as this part of the law is riddled with exceptions,⁴ the term "absolute" is too rigid to describe this liability, and that "strict" is a better term. Since the whole discussion seems rather sterile, therefore, without inuendo, it is proposed to use the term "strict" hereafter.

* B.A. (Oxon.); LL.M., University of Virginia, 1957.

¹ Wigmore, *Responsibility for Tortious Acts—Its History*, 7 HARV. L. REV. 315, 383, 441 (1894).

² L.R. 3 H.L. 330 (1868).

³ See Takayanagi, *Liability Without Fault in the Modern Civil and Common Law*, 16 ILL. L. REV. 163, 268; 17 ILL. L. REV. 187, 416 (1920-23).

⁴ PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 135 (1954).

That the strict liability concept is significant cannot be disputed. One writer⁵ has listed over sixteen manifestations of it in modern law. Nor, it is to be noted, is this significance confined to the law of torts; there is a growing trend to uphold criminal statutes which lay down no requirement of fault⁶ and, seemingly, strict liability may be imposed by contract.⁷

Professor Takayanagi⁸ has made an interesting analysis of the causes of the rise to prominence of strict liability; he suggests that the development of commerce, the use of motor power, and the sharp distinction between rich and poor are among many important factors. It seems that these technological changes have combined with the paternalistic philosophy of the 20th century to remove much of the emphasis on personal delinquency which was the product of the 19th century individualism.⁹ Interestingly, at almost exactly the same time that strict liability became a real issue, negligence as an independent tort was crystallizing in England.¹⁰ As will later be shown in discussing the relationship of negligence to strict liability, many contend that had negligence as a tort arisen twenty years earlier, strict liability might never have achieved its present significance.

It is the object of this article to consider the acceptance in the United States of the strict liability concept and to show that such acceptance is causing a cogent re-appraisal of traditional notions within the law of torts. In so doing, no attempt will be made to discuss the more obvious applications of strict liability long known to the common law, such as liability for fire, cattle trespass or damage by animals "ferae naturae."

Rylands v. Fletcher — Home and Abroad

The "Red House Colliery Case" of *Rylands v. Fletcher* decided nothing radically new. The defendants constructed a reservoir upon their land; and upon the site chosen for this purpose there were five disused and filled-up shafts of an old coal mine, the

⁵ Carpenter, *The Doctrine of Green v. General Petroleum Corporation*, 5 So. CALIF. L. REV. 263 (1932).

⁶ HALL, *PRINCIPLES OF CRIMINAL LAW* 282-97 (1947).

⁷ Keefer v. Lombardi, 376 Pa. 367, 102 A.2d 695 (1954).

⁸ Takayanagi, *Liability Without Fault in the Modern Civil and Common Law*, 16 ILL. L. REV. 268 (1921).

⁹ Note, 13 NOTRE DAME LAW. 226, 233 (1937). "The Scholastic idea that the individual is a moral unit and hence a political unit having equal responsibilities to his fellow men has promulgated the philosophical basis for a renewal of the rules of absolute liability."

¹⁰ *Heaven v. Pender*, 11 Q.B.D. 503 (1883).

passages of which communicated with the adjoining mine of the plaintiff. The mine shafts were not discovered during construction of the reservoir and no precautions were taken. When the reservoir was filled, water escaped down the shafts and through the passages, flooding plaintiff's mine.

The decision in the first instance of *Rylands v. Fletcher* was reversed the following year; this latter decision itself was affirmed by the House of Lords.

In argument for a decision in the first instance, counsel for the plaintiff relied on the doctrine of trespass and the remarks of Blackburn, J. in *In re Williams v. Groucott*,¹¹ but the court rejected his argument on the grounds that there was no fault, nor technically was there a trespass or a nuisance.¹² In dissent, Bramwell, B. said there was no need for any of these requirements, citing *Backhouse v. Bonomi*¹³ and the long record of liability for the spread of fire. To show that the question before the court was no novelty, the court referred to *Chadwick v. Trower*,¹⁴ decided twenty-five years earlier.¹⁵

The case was appealed and Blackburn, J. delivered the judgment of the court.¹⁶

The question of law therefore arises, what is the obligation which the law casts on a person who . . . lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escapes out of his land. . . .

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

He supported his statement by citing Holt, C. J. in *Tenant v. Goldwin*,¹⁷ decided in 1705. In the House of Lords,¹⁸ Blackburn's decision was upheld.

11 4 B. & S. 149, 122 Eng. Rep. 416 (K.B. 1863).

12 3 H. & C. 775, 149 Eng. Rep. 737 (Ex. 1865).

13 9 H.L.C. 503, 11 Eng. Rep. 825 (1861).

14 6 Bing. N.C. 1, 133 Eng. Rep. 1 (C.P. 1841).

15 It should be noted that Pollock, C.B. (with the majority) added that the negligence of the contractors in not discovering the mine shafts had not been sufficiently established to form a ground of judgment. This seems sufficient rebuttal of those who still insist that *Rylands v. Fletcher* was really a negligence case. See, Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801 (1916). It was not until eleven years later that an English court held that an employer might be liable for the negligence of an independent contractor. *Bower v. Peate*, 1 Q.B.D. 321 (1876),

16 L.R. 1 Ex. 265, 279 (1866).

17 Isalk. 21, 91 Eng. Rep. 20 (1705).

18 L.R. 3 H.L.R. 330 (1868).

Though the break of the wall and the ensuing escape in this case appears to have been capable of supporting a legitimate averment of trespass, its significance is that Blackburn made no attempt to distinguish it. He *thought* it was direct authority for his decision. We have here a decision which seemed to those involved in it to be far from "epochal in its consequences,"¹⁹ yet it aroused almost instant controversy. Some attempted to "explain the case away" on the grounds of negligence, as has already been shown. Some attempted to justify it on sociological grounds.²⁰ It seems, however, in the light of the rise of negligence, enhanced by the mechanization of the century, a case such as *Rylands v. Fletcher* was bound to stand out for all to observe, for the case occupied a most ambiguous territory, suspended between that which was clearly wrongful and that which was absolved from all blame. Its significance came from no consciously motivated policy of the mid-Victorian judges who decided it, but purely from its place in the time track of legal development. *Rylands v. Fletcher* came to be seen as an affront to the growing fault concept. This was particularly true of its immediate reception in the United States. In Massachusetts²¹ and Minnesota²² it was accepted; but this was not the beginning of a trend, for New York,²³ New Hampshire²⁴ and New Jersey²⁵ immediately rejected the decision.

The reason for the mixed reception given *Rylands v. Fletcher* in the United States lay in the forms of action. The long established common law rule was that no question of fault was relevant in a writ of trespass, while it was vitally significant in the writ *sur le cas* for consequential damage. American courts were very conscious of this distinction; through the use of it they could "flirt" with the idea of strict liability, yet still purport to reject it.²⁶ Decisions in two early cases decided in the courts of New York are typical of this enigmatic performance. *Hay v. The*

¹⁹ Wigmore, *Responsibility for Tortious Acts — Its History*, 7 HARV. L. REV. 441, 454 (1894).

²⁰ Molloy, *Fletcher v. Rylands — A Reexamination of Juristic Origins*, 9 U. CHI. L. REV. 266 (1941); Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. PA. L. REV. 298, 373, 423 (1911); Leflar, *Negligence in Name Only*, 27 N.Y.U.L. REV. 564, 574 (1952).

²¹ *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56 (1868).

²² *Cahill v. Eastman*, 18 Minn. 324 (1871).

²³ *Losee v. Buchanan*, 51 N.Y. 476 (1873).

²⁴ *Brown v. Collins*, 53 N.H. 442 (1873).

²⁵ *Marshall v. Welwood*, 38 N.J.L. 339 (1876).

²⁶ Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

*Cohoes Co.*²⁷ imposed strict liability for damages caused by blasting. The court stated that since there had been a trespass to property, fault need not be proved. Yet in *Booth v. Rome W. and O. T. R. Co.*²⁸ strict liability was rejected, not as such, but on the ground that the damage was consequential, and, therefore, negligence had to be proved.

In *Palsgraf v. Long Island R.R.*,²⁹ Cardozo referred to the decision in *The Cohoes Co.* case as "a rare exception, survival for the most part of an ancient form of liability" Yet, in that same year a California court³⁰ seems to have found in *Hay v. The Cohoes Co.* the moral support it needed for imposing strict liability under the guise of trespass through the use of the *sic utere tuo ut alienum non laedas* concept. In *Luthringer v. Moore*³¹ it was specifically pointed out that *Green v. General Petroleum Corp.*³² had enunciated a principle of strict liability without fault.

All jurisdictions have not approached the problem in this way. In some instances there have been outright acceptances³³ or rejections of *Rylands v. Fletcher*. Even so, Prosser³⁴ seems to come close to the mark when he suggests that many of those cases rejecting *Rylands v. Fletcher* would in fact be exempt in England under one of the recognized English exceptions to that case. In *Turner v. Big Lake Oil Co.*,³⁵ for example, the Texas court rejects *Rylands v. Fletcher* and then goes on to point out that oil well drainage pools are in any event outside the scope of that case, because a person using his land in Texas to store the salt water drainage of an oil well would not be a non-natural user of that land. On the other hand, according to the Texas court, "England is a pluvial country, where constant streams and abundant rains make the storage of water unnecessary for ordinary or general purposes."³⁶

Study would seem to show that the strict liability doctrine of *Rylands v. Fletcher* has made substantial inroads on tort con-

27 2 N.Y. 159 (1849).

28 140 N.Y. 267, 35 N.E. 592 (1893).

29 248 N.Y. 339, 162 N.E. 99 (1928).

30 *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952 (1928).

31 31 Cal.2d 489, 190 P.2d 1 (1948).

32 205 Cal. 328, 270 Pac. 952 (1928).

33 For a complete list see PROSSER, TORTS c. 9 (2d ed., 1955).

34 PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 135 (1954).

35 128 Tex. 155, 96 S.W.2d 221 (1936).

36 96 S.W.2d at 225.

cepts within the United States. In the remainder of the article, the writer will attempt to show the validity of a statement by Professor Molloy that:

Whatever the abstraction by which the decision has been justified or attacked, the importance of *Fletcher v. Rylands* lies in its reaffirmation of the "medieval" principle of action at peril, a concept strongly reflected in the trend of modern case law and legislation in an ever-increasing number of fields.³⁷

I. THE ACCEPTANCE OF ABSOLUTE LIABILITY

A. *Under the Guise of Nuisance*

"Nuisance, unhappily, has been a sort of legal garbage can,"³⁸ and it is for this reason that it is ideally suited to having its heterogeneous applications cover concepts which should stand on their own feet. Through the use of this concept, courts in the United States have been able to bring about a *Rylands v. Fletcher* result without expressly accepting that case, and in many instances while discrediting it. Thus, in *Turner v. Big Lake Oil Co.*,³⁹ the court purported to reject the principle of *Rylands v. Fletcher*, but it *did* admit a principle of absolute nuisance. In the New York case of *Heeg v. Licht*⁴⁰ in which the defendant was held strictly liable under the guise of nuisance for the explosion of gunpowder stored for making fireworks, there would also have been clear liability had *Rylands v. Fletcher* been the standard.

In *Bohan v. Port Jervis Gas-Light Co.*,⁴¹ the court says, "But where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or to the manner in which it is conducted, the law of negligence has no application, and the law of nuisance applies." Interestingly, *Sweet v. State*⁴² in referring to *Bohan* substituted for the term "nuisance," the term "strict liability."⁴³ The West Virginia Supreme Court in deciding *Weaver Mercantile Co. v. Thurmond*⁴⁴ used the doctrine of *res ipsa loquitur* to find a nuisance based on negligence and in effect applied strict liability. *Green*

37 Molloy, *Fletcher v. Rylands—A Reexamination of Juristic Origins*, 9 U. CHI. L. REV. 266, 267 (1941).

38 Prosser, *Nuisance Without Fault*, 20 TEXAS L. REV. 399, 410 (1942).

39 128 Tex. 155, 96 S.W.2d 221 (1936).

40 80 N.Y. 579 (1880).

41 122 N.Y. 18, 25 N.E. 246, 47 (1890).

42 195 Misc. 494, 89 N.Y.S.2d 506 (Ct. Cl. 1948).

43 89 N.Y.S.2d at 514.

44 68 W.Va. 530, 70 S.E. 126 (1911).

v. Petroleum Corp. is another good example. There, it will be remembered, the court talked vaguely about *sic utere tuo*. It then referred to *Sussex Land & Live Stock Co. v. Midwest Refining Co.*⁴⁵ which was a nuisance case. In a Louisiana decision it was said that a defendant who, although engaged in a lawful business conducted according to modern and approved methods and with reasonable care, causes risk and peril (*not* even damage) by such activities may be liable under the doctrine of strict liability.⁴⁶

In so many ways are the nature of things classed as nuisances akin to *Rylands v. Fletcher* that one authority has sweepingly declared, "there is in fact no case applying *Rylands v. Fletcher* which is not duplicated in all essential respects by some American decision which proceeds on the theory of nuisance, and it is quite evident that under that name the principle is universally accepted."⁴⁷

And another writer⁴⁸ described the two by stating that nuisance and the rule in *Rylands v. Fletcher* are related like the intersecting segments of circles. Why they are so closely akin is a difficult question to answer. It would seem that their common denominator lies either in the fact of "control" of the offensive instrumentality by the defendant, or in the judgment that one who adopts dangerous methods in the cause of progress must assume the risk inherent in them.⁴⁹ It is clear, however, that the courts have availed themselves of this close affinity between the two and have used nuisance to disguise what was in reality an adoption of strict liability.

B. *Negligence and Strict Liability*

It was stated earlier that had the concept of negligence as an independent tort risen at an earlier date, *Rylands v. Fletcher* would never have achieved its present importance. This section is an attempt to consider the justification for such a belief and to discern the present relationship between negligence and strict liability.

⁴⁵ 294 Fed. 597 (8th Cir. 1923).

⁴⁶ *Fontenot v. Magnolia Petroleum Co.*, 227 La. 866, 80 So. 2d 845 (1955).

⁴⁷ PROSSER, TORTS § 59 at 337-38 (2d ed. 1955).

⁴⁸ Winfield, *The Myth of Absolute Liability*, 42 L.Q.R. 37 (1926).

⁴⁹ See *Hickey v. McCabe*, 30 R.I. 346, 75 Atl. 404 (1910); *Bohan v. Port Jervis Gas-Light Co.*, 122 N.Y. 18, 25 N.E. 246 (1890).

From a theoretical viewpoint there is much in common between the objectivity of strict liability and that of the "reasonable man." In his book, *The Common Law*, Holmes says:

But as the law has grown, even when its standards have continued to model themselves upon those of morality, they have necessarily become external, because they have considered not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril.⁵⁰

And Professor W. G. Friedmann stresses that negligence is itself not concerned with states of mind, but with standards of conduct and it is thus moving toward a social insurance principle.⁵¹ The idea of a high duty of care which almost turns an actor into an insurer⁵² is nothing strange, yet it does seem to stretch the concept of negligence too far in an effort to produce socially desirable results. The danger of this has been effectively pointed out by one writer:

[T]his diluted doctrine [*i.e.*, diluted negligence doctrine], unless carefully administered, is likely to effect *too broad* an extension of liability in cases involving the negligent behavior of "small people" in the "back-yard" cases, which *should* be disposed of only under the "moral" version of the foreseeability test. Indeed, it might even effect too broad a liability in litigation against organized enterprise because of its failure to emphasize as the focal point for determining the liability of particular enterprises the "typical" nature of the hazard involved or of the harm ensuing.⁵³

Many of the "operative" requirements are the same for both negligence and strict liability. By operative requirements it is meant those factors which must be present in order to sustain an allegation either of negligence or strict liability. The duty of care involved in both strict liability and negligence extends to a theoretically infinite number of persons (provided they are foreseeable). If one examines cases such as *Klepsch v. Donald*⁵⁴ and *Houghton v. Loma Prieta Lumber Co.*⁵⁵ one sees strict liability restricted to the general class of persons threatened, and in a Privy Council opinion in 1902⁵⁶ the law lords also applied the

⁵⁰ HOLMES, *THE COMMON LAW* 162 (1881).

⁵¹ Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949).

⁵² Cardozo, C.J. in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 16 N.E. 99, 100 (1928) (dictum).

⁵³ Note, 8 U. CHI. L. REV. 729, 737 (1941).

⁵⁴ *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991 (1892).

⁵⁵ 152 Cal. 500, 93 Pac. 82 (1907).

⁵⁶ *Eastern & South African Telegraph Co. v. Cape Town Tramways Cos.*, [1902] A.C. 891.

limitation that the harm ensuing from a *Rylands v. Fletcher* situation must be one of a general class of harms threatened. These two limitations are exactly the same as those in negligence cases. Professor James,⁵⁷ in referring to the foreseeability requirement, makes the interesting point that if foreseeability of the risk involved in carrying on the activity is a prerequisite to insurance (which it surely is), and if insurance is necessary to enable the activity to carry on at all (which it is), "it must be present before absolute liability can be imposed, and is therefore a necessary element in any adequate absolute liability doctrine." Prima facie this would seem to assimilate negligence (based on duty which is in turn based on foreseeability) with strict liability, and indeed they come close; but a basic difference lies in the fact that while damage ensuing from strict liability is the result of a calculated act, tolerated by society, damage from negligence is not. Despite this, one finds counsel in the *Whitman* case⁵⁸ along with Justices Baldwin and O'Sullivan (dissentiente) agreeing that the phrase "in such a way as will necessarily or obviously expose the person of another to the danger of probable injury" imports a degree of negligence.⁵⁹ More likely the phrase, and so the majority considered, is a causal explanation relating the act to the damage. Even here one can see again why errors arise, since causation problems are common both to negligence and strict liability. It is one more of the operative facts mentioned earlier.⁶⁰ For this reason it is difficult to agree with Professor Harper⁶¹ when he suggests that in order to differentiate negligence and strict liability one should concentrate more on the consequences of conduct rather than on the conduct itself, for neither the conduct nor the consequences seem to be so radically different in either concept. It is the mental attitude *behind* the conduct and the attitude of society which is important.

The theoretical relationship between negligence and strict liability is only half of the story, for the courts, too, have played an active part. Their way of approaching it has been different. It is true that the courts have made no attempt to "dovetail"

⁵⁷ Comment, *Absolute Liability for Ultrahazardous Activities*, 37 CAL. L. REV. 269 (1949).

⁵⁸ *Whitman Hotel Corp. v. Elliot & Watrous Engineering Co.*, 137 Conn. 562, 79 A.2d 591 (1951).

⁵⁹ *Louden v. Cincinnati*, 90 Ohio St. 144, 106 N.E. 970 (1914).

⁶⁰ *Maddseen v. East Jordan Irrigation Co.*, 101 Utah 552, 125 P.2d 794 (1942).

⁶¹ Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001 (1932).

negligence and strict liability in theory; what they have done is to apply the *theory* of negligence to yield the *practical result* of strict liability. Thus Professor Feezer:⁶²

Without abandoning what Professor Green calls the "theology of negligence", they have found it possible to place responsibility on defendants for harms unimagined by the judges who first formulated those doctrines, although the doctrines invoked were the rationalization of decisions which denied recovery and left the loss with the plaintiff who had sustained it.

This seems substantially borne out by cases considering the duty of care owed by electric companies. One such case was *Chase v. Washington Water Power Co.*⁶³ in which an action was brought against the electric company for the burning of plaintiff's barn. Chicken hawks had interlocked talons while engaged in an aerial battle and while so interlocked one touched a high-tension transmission line and the other a guy wire. The birds thus formed the connecting link through which electricity passed to the guy wire. The guy wire touched a barbed wire fence and through this electricity was transmitted to the farmer's barn, which was destroyed by fire. The company was held guilty of negligence in permitting the uninsulated guy wire to remain in contact with the fence wire and could not be absolved from liability merely because it had spaced the transmission line and guy wire twenty-eight inches apart in accordance with the accepted standard.

Negligence was the ground for liability in *S. W. Gas and Electric Co. v. Lain*⁶⁴ where a man, standing on top of an oil tank between eleven and thirteen feet under a wire, touched the wire with a twenty foot "riser" pole he was withdrawing from the tank, and was fatally electrocuted. And in *Wise v. Southern Indiana Gas and Electric Co.*⁶⁵ a youth of sixteen with a mental age of twelve sued successfully on a negligence count after he had illegally climbed eighteen feet of bridge superstructure and touched sagging high-tension wires. The court on the one hand talked of knowledge of the presence of trespassers as barring a defense on that ground; and then, on the other hand, said that the trespass could not go in mitigation of liability because the defendants did not own the bridge.

⁶² Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805, 810 (1930).

⁶³ 62 Idaho 298, 111 P.2d 872 (1941).

⁶⁴ 139 F.2d 142 (5th Cir. 1943).

⁶⁵ 109 Ind. App. 681, 34 N.E.2d 975 (1941).

Plaintiff recovered in *Polk v. Los Angeles*,⁶⁶ even though he had seen signs warning him that high-voltage wires passed through trees, and had nonetheless proceeded to prune them without using rubber gloves or an insulated pruning instrument.⁶⁷

These cases seem also to be a part of a trend in tort law in the United States which was summed up by a writer when he said:

I have noticed . . . a marked tendency in negligence cases to allow a case to go to the jury when the allegation of negligence is sustained, if at all, by a mere scintilla of evidence. [The idea that he who is at fault shall be liable has been] replaced by a philosophy that one who is injured shall recover.⁶⁸

This philosophy can also be discerned in master-servant cases in suits brought against the master on grounds of respondeat superior. Discrepancy will often be noted in the inconsistent treatment accorded the master and the servant. In *Strickfaden v. Greencreek Highway Dist.*,⁶⁹ the verdict of the jury against the defendant was upheld by the Supreme Court of Idaho, notwithstanding a simultaneous verdict in favour of the foreman, for whose negligence the defendant was held liable. The court justified itself by citing a number of cases which seem either to suggest that the jury in finding for the individual was wrong, or that such a finding is not relevant.⁷⁰

A further method of utilizing the concept of negligence has appeared in some of the blasting cases. The premise here seems to be that since negligence is only a question of degree anything can be brought within its scope. Thus, in *Simonton v. Loring*⁷¹ the court says:

The rule of ordinary care affords reasonable freedom in the use as well as reasonable security in the protection of property. For the degree of care which the rule imposes must be in proportion to the extent of injury which will be likely to result should it prove insufficient . . . [O]rdinary care wholly depends on the particular facts of each case

⁶⁶ 26 Cal.2d 519, 159 P.2d 931 (1945).

⁶⁷ See also *Ottertail Power Co. v. Duncan*, 137 F.2d 157 (8th Cir. 1943); *American Mut. Liab. Ins. Co. v. Bookley & Co.*, 117 F.2d 845 (3d Cir. 1941); *Ward v. New York State Elec. and Gas Corp.*, 290 N.Y. 325, 49 N.E.2d 159 (1943); *Eldredge, Tort Liability to Trespassers*, 12 TEMP. L. Q. 32 (1937).

⁶⁸ McCord, *Are You Your Brother's Keeper?*, 1950 INS. L. J. 709.

⁶⁹ 42 Idaho 738, 248 Pac. 456 (1926).

⁷⁰ See also *Judd v. Oregon Short Line R.R.*, 55 Idaho 461, 44 P.2d 291 (1935); *Sandro v. Missoula Light & Water Co.*, 48 Mont. 226, 136 Pac. 211 (1913); *Illinois Cent. R.R. v. Clark*, 65 Miss. 691, 38 So. 97 (1905).

⁷¹ 68 Me. 164, 165 (1878).

Again in *Simon v. Henry*⁷² Mr. Justice Dixon says:

[B]lasting close by a building necessarily would require a high degree of care — perhaps the highest degree of care [whatever he means by this?] . . . It all comes under the term “reasonable,” after all, depending upon all the circumstances surrounding it.

So, in *Fitzsimmons & Connell Co. v. Braun*⁷³ (a blasting case), Boggs, J. cites Thompson on Negligence as stating that where blasting is done, say, in a populous city, damages are recoverable without proof of negligence, for the reason that in such a case the work is so inherently dangerous that the *doing* of it, no matter how carefully, is of itself negligence.⁷⁴ It has already been shown that it would seem *not* to be negligence, since it is tolerated by society, provided damages are paid.

The whole process is described by Holmes⁷⁵ with his usual clarity:

[R]ules which seem to lie outside of culpability in any sense have sometimes been referred to as remote fault, while others which have started from the general notion of negligence may with equal ease be referred to some extrinsic ground of policy.

And so, surprising though it may seem to those who first saw *Rylands v. Fletcher* as an affront to the fault concept, it has been through the idea of a rather distorted “fault” that it has made much of its progress. Two courts have aptly stated the problem. In his concurring opinion in *Escola v. Coca-Cola Bottling Co.*, Judge Traynor concluded:

It is needlessly circuitous to make negligence the basis of recovery and impose what is really liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of reason there is no reason not to fix that responsibility openly.⁷⁶

In *Wilkerson v. McCarthy, Trustees*,⁷⁷ where a railroad was held liable to the plaintiff employee for injury from crossing a plank over a pit, even though the defendants had put up posts and

⁷² 62 N.J.L. 486, 41 Atl. 692 (1898).

⁷³ 199 Ill. 390, 65 N.E. 249, 251 (1902).

⁷⁴ Though it is possible that this particular decision proceeded on the basis that the defendants engaged in blasting operations when they had been told not to do so.

⁷⁵ HOLMES, THE COMMON LAW c. 3 (1881).

⁷⁶ 24 Cal.2d 453, 150 P.2d 436, 441 (1944).

⁷⁷ 336 U.S. 53 (1948).

chains to prevent just such an entry into the area, Mr. Justice Jackson in dissent stated:

I am not unaware that even in this opinion the Court continues to pay lip service to the doctrine that liability in these cases is to be based only upon fault. But its standard of fault is such in this case as to indicate that the principle is without much practical meaning. . . .

[I]f this Court considers a reform of this law appropriate, and within the judicial power to promulgate, I do not see why it 'should constantly deny that it is doing just that.'⁷⁸

C. *Strict Liability and Res Ipsa Loquitur*

"Res ipsa loquitur," which originated with the 19th century English decision in *Byrne v. Boadle*,⁷⁹ is a type of evidence permitted under certain circumstances to raise an inference or a presumption of negligence. The first circumstance is that there must be an accident which would normally not occur without negligence on someone's part. Secondly, there must be no voluntary contribution by the plaintiff; and finally, the factor(s) causing the accident must be within the exclusive control of the defendant.⁸⁰ These requirements have allowed courts to use res ipsa to cloak the application of strict liability. Thus, in *Prentiss v. National Airlines*,⁸¹ a New Jersey statute which imposes strict liability for civil airline crashes resulting in damage to persons or property on the ground when the injured party is not negligent was held constitutional and justified on the ground that it is impossible in about seventy per cent of airline crashes for the plaintiff to prove what actually caused the accident.

The major proponent of the use of res ipsa loquitur to effectuate strict liability was Professor Thayer.⁸² He contended that *Rylands v. Fletcher* is rendered almost completely impotent by exceptions such as "act of God" and "act of a stranger" which may be pleaded in defense; and that it will only be an effective legal principle when the defense of negligence precludes the pleading of these exceptions. In view of this, he thought that what remains of "pure" *Rylands v. Fletcher* could be classed merely as a high duty of care, with the difficulty of getting evidence of "what goes on" on a neighbour's land overcome by the doctrine of res ipsa loquitur. In *Escola v. Coca-Cola Bottling*

⁷⁸ *Id.* at 76.

⁷⁹ 2 H & C., 159 Eng. Rep. 299 (1863).

⁸⁰ PROSSER, TORTS 201 (2d ed. 1955).

⁸¹ 112 F. Supp. 306 (D.N.J. 1953).

⁸² Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801 (1916).

Co.,⁸³ plaintiff waitress was injured when a bottle exploded in her hand through no apparent cause. Although witnesses were called to prove that these bottles underwent the most rigorous testing at pressures far above that under which they were normally filled, the majority of the court held the defendants liable under *res ipsa*. Mr. Justice Traynor, in dissenting, was a little more frank:

In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.⁸⁴

Another clear manifestation of this use of the doctrine occurs in its application to multiple defendants. Under *res ipsa*, the defendant has always been allowed to rebut the allegation that he was negligent. One of the most effective ways of doing this is to show that somebody else was. Now, however, such a legitimate escape has been precluded in some courts by the procedural device of allowing plaintiff to join all possible negligent parties as defendants and recover from all of them. In *Litzmann v. Humboldt County*⁸⁵ a minor picked up an aerial bomb lying in a fairground. It exploded, and he was injured. On appeal it was held that if the jury were unable to determine which of two defendants were guilty of actionable negligence, both defendants should be held liable under *res ipsa*. A patient was injured while unconscious as a result of the use of an anaesthetic in *Ybarra v. Spangard*⁸⁶ and *res ipsa* was applied to all the defendants in the hospital who could have injured him. It does seem, however, that the California Supreme Court was "feeling" for some restriction on the use of *res ipsa* in this manner when it decided this case, in so far as it seemed to require some "community of interest" among the defendants so joined. In *La Rocco v. Fernandez*,⁸⁷ in Colorado, *res ipsa* was applied to the drivers of two cars where the death of the driver of a third car was caused by an unascertained one of them; and, in *Loch v. Confair*,⁸⁸ a *res ipsa* case was allowed to go to the jury where either retailer or bottler or both appeared *prima facie* negligent. These de-

⁸³ 24 Cal.2d 453, 150 P.2d 436 (1944).

⁸⁴ *Id.* at 440.

⁸⁵ 273 P.2d 82 (Dist. Ct. App. Cal. 1954).

⁸⁶ 25 Cal.2d 496, 154 P.2d 687 (1944).

⁸⁷ 130 Col. 504, 277 P.2d 232 (1954).

⁸⁸ 372 Pa. 326, 93 A.2d 451 (1953).

cisions by no means stand alone,⁸⁹ and the question arises whether the use of *res ipsa* in this fashion is a legitimate one.

The answer to this would appear to depend to a great extent on one's analysis of that doctrine itself. Does the use of the *res ipsa* merely create an inference sufficient to get the case before the jury, but no more, or does it raise a presumption? Only if it is the latter can it properly be used to apply strict liability in the manner suggested by Thayer. A number of American decisions have treated it as a presumption of negligence which must be rebutted as such,⁹⁰ but Prosser says that such an attitude is fast disappearing.⁹¹ In 1913 the United States Supreme Court treated *res ipsa loquitur* as a mere permissible inference.⁹²

While *res ipsa loquitur* will in many instances bring about the same result as would the application of strict liability in the same situation, it will not always affect such a result. The doctrine of *res ipsa* only applies when the unexplained accident ordinarily would not have happened in the absence of negligence, while strict liability is predicated on a risk which the utmost care could not have obviated. Also, a defendant in a negligence action only has to show that he was not negligent, whereas in strict liability cases he has to show *positively* some authorized defense such as an act of God. Therefore, while it has been shown that *res ipsa loquitur* has been used as an instrument of policy to impose strict liability, those decisions which reject its use in this fashion better serve the cause of clarity. The rule in *Rylands v. Fletcher* is both historically prior to and separate from negligence and *res ipsa* in its origin, and is grounded in policy, while negligence is and should be grounded in fault. As Ehrenzweig has said of this twisting of negligence, nuisance, and *res ipsa loquitur*, "Greater instability and uncertainty may result from such precedent stretching than from an open rejection of earlier cases, and an outright recognition of absolute liability."⁹³

D. *Products Liability*

The scope of liability attaching to the sale of harmful goods,

⁸⁹ See also, *Kansas City F.S. & M. Ry. v. Stoner*, 49 Fed. 209 (8th Cir. 1892); *Pearlman v. King Lumber Co.*, 302 Ill. App. 190, 23 N.E.2d 826 (1939).

⁹⁰ *Shecter v. Hann*, 305 Ky. 794, 205 S.W.2d 690 (1947); *Kearner v. Tanner Co.*, 31 R.I. 203, 76 Atl. 833 (1910); *Cleveland, C. C. & St. L. Ry. v. Hadley*, 170 Ind. 204, 34 N.E. 13 (1908); Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. Pa. L. Rev. 307, 316 (1920).

⁹¹ PROSSER, *TORTS* 213 (2d ed. 1955).

⁹² *Sweeney v. Erving*, 228 U.S. 233 (1913).

⁹³ EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* 27 (1951).

i.e., products liability, is also of much concern today.⁹⁴ Through the use of implied warranty and by the extension of traditional tort concepts the result has been to place strict liability on the manufacturers in many instances. In the implied warranty cases, it seems that the courts are more able to get around the overly restrictive *Winterbottom v. Wright*⁹⁵ privity requirement⁹⁶ through the implementation of a third party beneficiary theory: "[A]ny implied warranty action available to a buyer in a two-party contract of sale is equally available to third parties, or to a class of third parties who are clearly designated as the intended beneficiaries of a multi-party transaction."⁹⁷

In England several interesting developments have taken place in this field. The first attempt to have anything like a third party beneficiary died with the "constructive trust" theory in 1933,⁹⁸ and a second abortive attempt by the Law Revision Committee⁹⁹ went the same way. However, through *Adler v. Dickson*¹⁰⁰ and *Pyrene v. Scindia*¹⁰¹ a new doctrine has arisen that where by "necessary implication" a third party is to play some part in the contract he is entitled to all benefits of that contract and is subject to all its burdens.

In addition to the use of the third party beneficiary doctrine, the privity necessity is being avoided by a resort to legal history. Thus, Judge Traynor in 1944,¹⁰² citing Ames, "The History of Assumpsit,"¹⁰³ stated that the action for breach of warranty was originally tortious, and only late in its history was a remedy in assumpsit permitted.¹⁰⁴ This, therefore, makes privity irrelevant. Breach of warranty then would seem to be in reality a form of deceit. This shift towards a tortious concept of manufacturer's liability is well illustrated by the history of liability for defective vehicles. One starts with *Winterbottom v. Wright* where Baron

⁹⁴ See, e.g., Note, 65 YALE L. J. 262, 267 (1955).

⁹⁵ 10 M. & W. 109, 152 Eng. Rep. 402 (1842). This case enunciated the rule that one furnishing chattels to another owes no duty of care to a third party with whom he is not in privity of contract.

⁹⁶ See, *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1920); *Dryden v. Continental Baking Co.*, 11 Cal.2d 33, 77 P.2d 833 (1938) (dictum).

⁹⁷ Note, 65 YALE L. J. 262, 267 (1955).

⁹⁸ *Vandepitte v. Preferred Acc. Ins. Corp. of New York*, [1933] A.C. 70 (P.C.).

⁹⁹ *Sixth Interim Report*, Para. 50 (9).

¹⁰⁰ (1954) 3 All E. R. 397 (C.A.).

¹⁰¹ (1954) 2 All E. R. 158 (Q.B.).

¹⁰² *Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436, 443 (1944).

¹⁰³ 2 HARV. L. REV. 1 (1888).

¹⁰⁴ WILLISTON, CONTRACTS § 970 (Rev. ed. 1936).

Alderson withheld liability by applying the strict rule of privity. In doing so he said, "If we go one step beyond [privity], there is no reason why we should not go fifty." In 1903 some of his "fifty steps" were taken by a circuit court¹⁰⁵ which drew a distinction, later repudiated in *MacPherson v. Buick Motor Co.*, between products supplied specifically for the use of one person, and those supplied for use by unknown persons. One finally reaches *MacPherson v. Buick Motor Co.*,¹⁰⁶ in which Cardozo anticipates by many years the English decision in *Donoghue v. Stevenson*¹⁰⁷ by ruling that:

If the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made . . . [and] . . . there is added knowledge that the thing will be used by persons other than the purchaser . . . without new tests, then, irrespective of contract, the manufacturer . . . is under a duty to make it carefully.¹⁰⁸

Nor does the trend appear to be stopping here. While *MacPherson v. Buick Motor Co.* confines itself to negligently made vehicles, it seems that its rule might equally well apply today to negligently designed vehicles.¹⁰⁹

A number of other examples might also be chosen. In *Chapman Chemical Co. v. Taylor*¹¹⁰ crops were sprayed from an airplane with a chemical compound which spread further than was customary and caused damage to neighboring farms. The seller of the spray was sued and the court said:

If one casts into the air a substance which he knows may do damage to others, and in some circumstances will certainly do so, principles of elementary justice, as well as the best public policy require that he know how far the substance will carry . . . and what damage it will do in the path of its journey, and if he releases such a substance either from ignorance of, or in indifference to the damage that may be done, the rule of strict liability should be applied.¹¹¹

This seems to be a situation where negligence and strict liability are moving towards each other under the head of products liability. At one end then, one finds an increasing modification of *Winterbottom v. Wright* amounting almost to a form of insur-

105 *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865 (8th Cir. 1903).

106 217 N.Y. 382, 111 N.E. 1050 (1916).

107 (1932) A.C. 562.

108 111 N.E. at 1053.

109 Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956).

110 215 Ark 630, 222 S.W.2d 820 (1949).

111 *Id.* at 827.

ance based on control;¹¹² and, at the other, the idea that strict liability is a matter, as Thayer has put it, of due care under the circumstances.

Professor Feezer¹¹³ poses the question: if the courts are moving towards a question of capacity to bear loss, what is the nature of the judicial process involved? Are the courts merely extending old negligence principles, or are they evolving new concepts of liability? The answer to this seems to be that they are extending old principles toward another old principle — that of strict liability.

The question of capacity to bear loss will be dealt with more fully later, but since in products liability the loss can be shifted on to the customer via the price mechanism it may be briefly discussed here. This use of the price mechanism was referred to by Judge Holt in *Bridgman Russell v. Duluth*:¹¹⁴

If a break occurs in the reservoir itself, or the principal mains, the flood may utterly ruin an individual financially. In such a case, even though negligence be absent, natural justice would seem to demand that the enterprise, or what is really the same thing, the whole community benefited by the enterprise, should stand the loss rather than the individual: It is too heavy a burden upon one.

Many legal thinkers have become aware that strict products liability eventually entails risk shifting, and much discussion has prevailed as to whom is best suited to shift the risk — manufacturer, wholesaler or retailer.¹¹⁵ Generally, of course, it will be best to place the loss where the most pressure will be exerted to keep down future losses. There is also another school of thought whose members agree with the statement of Judge Learned Hand that absolute civil liability is not the answer to the problem, and that statutory prohibitions and penalties are the true solution.

Dean Pound reviews the whole of the above tendency and sees it as an element in the movement towards a service state.¹¹⁶ The *Rylands v. Fletcher* type case is legitimate, he says, on the grounds of social interest in the general security, but he resents

¹¹² Friedmann, *Modern Trends in the Law of Torts*, 1 MOD. L. REV. 39 (1937).

¹¹³ Feezer, *Ability to Bear Loss as a Factor in the Decision of Certain Tort Cases*, 79 U. PA. L. REV. 742, 743 (1930-31).

¹¹⁴ 158 Minn. 509, 197 N.W. 971, 972 (1924).

¹¹⁵ Waite, *Retail Responsibility and Judicial Law Making*, 34 MICH. L. REV. 494 (1936). Brown, *The Liability of Retail Dealers for Defective Food Products*, 23 MINN. L. REV. 585 (1939).

¹¹⁶ Pound, *Law In the Service State: Freedom Versus Equality*, 36 A.B.A.J. 977, 981 (1951).

its extension to absolute liability grounded on the individual's claim "that a full economic and social life [be] provided for him."

II. STRICT LIABILITY AND STATUTE

In being critical of the use of negligence, *res ipsa loquitur*, and nuisance to apply liability without fault, we should remember that judges are not legislators; and where legislatures are dilatory, there may even be something praiseworthy in the courts' use of these doctrines to reach what they consider is a just result. Nevertheless, it would seem that it would be far better for the legislature to expressly set out the law and in a number of instances this has been done. Perhaps the most outstanding example is the legislation concerning Workmen's Compensation.

The early Workmen's Compensation Acts were confined to what seems to be a basis of "ultrahazardous" acts;¹¹⁷ but, by the time Professor Smith wrote his definitive article on the subject in 1913, there were more American states which did not so restrict the law than those which did.¹¹⁸ There has been a growing tendency on the part of courts to so construe these acts as to impose strict liability on employers. A recent example of this is *University of Denver v. Nemeth*¹¹⁹ where a student football player, injured in spring football practice, was held to be "within the course of employment" — the employment being a totally dissociated job for \$50 a month performing tasks around the tennis courts. The job was dependent on his playing football. This, of course, is in accord with the increasing protection afforded the employee.

Although some important employee groups are not covered by this legislation, they are assisted in other ways. Thus, railway workers are protected to some extent by the Federal Employers Liability Act, which abrogated such devices as the "fellow servant rule" and contributory negligence. The Jones Act of 1915 and the Merchant Marine Act of 1920 do much the same thing for seamen. In 1926, Professor Burdick referred to this trend as:

[E]vidence of a very general legislative policy to get away from fault as the basis of liability, and to make a business insure against loss to its employees. This would seem to be but one of

117 Workmen's Compensation Act, 1897, 60 B. 61 Vict., c.37.

118 Smith, *Sequel to Workmen's Acts*, 27 HARV. L. REV. 235, 367 (1913).

119 127 Colo. 385, 257 P.2d 423 (1953).

the manifestations of the modern trend towards collectivism, as opposed to the individualism of the eighteenth and first half of the nineteenth centuries.¹²⁰

Some writers would place Workmen's Compensation and strict liability in quite distinct categories. Perhaps the most outspoken has been Larson in his book on Workmen's Compensation.¹²¹ He says that "almost every major error that can be observed in the development of compensation law . . . can be traced [most commonly] to the importation of tort ideas." He goes on to point out that only damage which produces disability is actionable (and even then only on a "bare minimum standard of life" scale) and that this differentiates it from tort recovery. The answer to this seems to be that this criticism goes only to the question of *damages* in the tort field, and not to the principle of strict liability itself. Even Larson concedes that "Workmen's Compensation, far from being a violation of moral principle, is in fact the only morally satisfactory solution . . . once you concede that morality has a group as well as an individual aspect."¹²² This is the very essence of strict liability—it subjugates the non-culpability of the individual actor to the welfare of the group.

The example of the above compensatory statutes has been followed in an ever-increasing number of fields, and usually the social goal is effected not by saying that the defendant "shall be strictly liable," but by making the defendant conclusively or presumptively guilty of negligence or nuisance. Thus, the old forms of liability are utilized to play a different role. There is little that can be said of those statutes which make proof of certain acts conclusive of the commission of a tort,¹²³ except that like all fields of tort they are limited by rules of causation. In the case of those statutes which create a presumption¹²⁴ of a tort upon proof of the act, the question is more difficult. In some cases a court will say that the presumption may be rebutted by mere proof that due care was used, while in others the court will demand more affirmative evidence, in which event (as in "conclusive" statutes) the effect is creation of strict liability. This is particularly true where breach of a statute is considered negligence per se by the court.

¹²⁰ BURDICK, TORTS 17-18 (4th ed. 1926).

¹²¹ 1 LARSON, WORKMEN'S COMPENSATION §§ 1.20, 2.20, 2.40, 2.50 (1952).

¹²² *Id.*, § 2.20.

¹²³ IOWA CODE § 1370 (1927). One suggesting to a workman that he reject workmen's compensation benefits is guilty of fraud. MICH. COMP. LAWS § 4825 (1915). Member of a family driving car is conclusive of consent.

¹²⁴ ILL. LAWS 51st Gen. Assembly 1919, at 678. GA. CODE ANN. § 2780 (1914) (proof of collision between car and train).

Such finding of negligence per se often results where breach of a criminal statute is involved. Thus, in *Stehle v. Jaegar Automatic Machine Co.*,¹²⁵ a child was injured during employment which was in contravention of a statute. The Supreme Court of Pennsylvania held that it was never a question for the jury whether one violating a statute exercised reasonable care in so doing. There has to be a finding of negligence. The question arises whether a criminal statute which makes no mention of civil liability is nevertheless impliedly intended to create such concurrent remedy; and, if so, by what means. Thus, the Federal Food, Drug, and Cosmetic Act of 1938¹²⁶ says that violation by a manufacturer shall constitute a misdemeanor, and such policy regarding the public as a whole has been approved on a number of occasions. In *United States v. Dotterweich*¹²⁷ the Court said: "In the interest of the larger good [such legislation] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."¹²⁸ The ability to approach statutes in this fashion is very useful to the courts; a "pure food" statute for example is a better source of a civil action than a warranty, for it does not suffer from any privity limitation, and it survives the death of the injured party.¹²⁹ Even so, is any further extension justifiable? The dilemma seems to be this: the courts in civil cases do not wish to ignore the publicly expressed will of the legislature for fear of inconsistency;¹³⁰ yet, in order not to do so, they are called upon to equate that conduct which violates a criminal statute with that which constitutes negligence. Thayer says that the analogy should be to public nuisance, and that the individual may only recover when he has suffered some special damage peculiar to himself.¹³¹ It is submitted, however, that the question of damage is not the crux of the matter, but that the central issue is one of duty.

But, is there any effective analogy between the duty of care based on the standard of the "reasonable man," and the "duty" incumbent upon, say, a retailer of food under a "pure-food"

125 225 Pa. 348, 74 Atl. 215 (1909).

126 52 STAT. 1040 (1938), 21 U. S. C. § 333 (1952).

127 320 U.S. 277, 281 (1943).

128 Reasoning approved in 62 Cases of *Jam v. United States*, 340 U.S. 593; 596 (1951).

129 *Kress and Co. v. Lindsey*, 262 Fed. 311 (5th Cir. 1931).

130 Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

131 *Id.* at 326-28.

statute? Only if there is would there appear to be any justification for making contravention of a statute negligence per se. Those cases which hold such contravention to be mere evidence of negligence seem to have avoided one inconsistency only to be faced with another, for this is the equivalent of saying to the jury, "Well, the legislature might be right, but we leave it to you to contradict them if you wish."

As to the relation between that type of statute, the breach of which creates negligence per se and ordinary common law negligence, two main points should be considered. First, there does seem to be some form of standard implicit in some criminal statutes akin to the common law standard of negligence. This of course is the standard which the legislature has set within the statute itself; such a standard, or duty, is breached by those who violate the statute. Secondly, however, there is disparity, and this disparity lies not in the question of standards, but in the question of causation. Breach of a criminal statute cannot per se cause damage and, therefore, the use of the criminal statute breach to impose civil liability without an inquiry into the causal chain extends civil liability beyond that imposed by common law negligence. This factor was recognized in *Faulk v. Fingleman*¹³² where an automobile was struck by a fire truck and pushed forward into the plaintiff who was injured as a result. The car had been parked in violation of a city ordinance, and its owner was brought into the lawsuit as a defendant. The court found in favor of the automobile owner on the ground that breach of the city ordinance was merely a condition and not a contributing cause of the injury to the plaintiff. Consider also *Brown v. Shyne*,¹³³ a case involving the practicing of medicine without a license in contravention of the New York State Public Health Law, in which Lehman, J. said:

True, if the defendant had not practiced medicine in this state, he could not have injured the plaintiff, but the protection which the statute was intended to provide was against risk of injury by the unskilled or careless practitioner, and, unless the plaintiff's injury was *caused* by carelessness or lack of skill, the defendant's failure to obtain a license was not connected with the injury.¹³⁴

One must recognize, therefore, that the term negligence per se as used in conjunction with a violation of criminal statutes bears

¹³² 268 Mass. 524, 168 N.E. 89 (1929).

¹³³ 242 N.Y. 176, 151 N.E. 197 (1926).

¹³⁴ *Id.* at 198.

no true relation to common law negligence. It is merely a means used to apply strict liability in the hope that the use of familiar terminology will mitigate resistance to a relatively radical concept.

III. THE RESTATEMENT OF THE LAW OF TORTS

Chapter 21, section 519 of the Restatement reads:

Except as stated in §§ 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting therefrom from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.¹³⁵

The first thing to note about this statement is that it is not in accord with English common law on the subject of strict liability which, as Lord Justice Scott pointed out in *Read v. Lyons and Co.*,¹³⁶ concerns itself more with acts than activities. This section of the Restatement, on the other hand, seems quite clearly to be based on a theory of risk. This is illustrated by the fact that the Restatement goes beyond English law in ignoring the place where the activity is carried on. On the other hand, the Restatement is narrower than the English rule in emphasizing the extreme danger which cannot be eliminated even by the utmost care.

Restatement section 520 defines "ultra-hazardous" as follows:

- (a) Necessarily involves the risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and
- (b) is not a matter of common usage.

The requirement of "common usage" is probably drawn from Lord Cairns' original modification of Blackburn's rule in *Rylands v. Fletcher*, and is justified, as one writer put it:¹³⁷ "[because] if the activity is one carried on by a larger proportion of persons in the community, the incidence of harm and the incidence of responsibility are so nearly coextensive that nothing would be gained by imposing strict liability." Professor Goodhart has said¹³⁸ that both the English limitation of "natural user" and the United States limitation of "common usage" are breeding grounds of doubt and ought to be replaced by the criterion of "reasonableness." With this it is difficult to agree. As courts

¹³⁵ RESTATEMENT, TORTS § 519 (1938).

¹³⁶ (1945) 1 K.B. 216, 228.

¹³⁷ Note, 61 HARV. L. REV. 515, 520 (1947).

¹³⁸ Goodhart, *Restatement of the Law of Torts, Volume III: A comparison Between American and English Law*, 89 U. PA. L. REV. 265, 272 (1941).

become more and more aware of the value of statistical surveys and kindred aids, it seems that it will be far easier to give content to the term "common usage" than to the term "reasonable."

Section 520 (h) states that what is ultra-hazardous is a matter of law for the court to decide. This statement is sometimes ignored despite the decisions upholding it in *Green v. General Petroleum Corporation*¹³⁹ and *Luthringer v. Moore*.¹⁴⁰ This is unwise, for to deprive the court of its discretion here is to remove from it a powerful instrument of policy and consistency, and replace it with the vagaries of jury decisions. If such trend were to continue, those who look for progress will definitely have to look to legislation, for strict liability at common law will remain a "wilderness of single instances."

Under section 521 performance of a public duty exempts a party from liability under section 519.¹⁴¹ This has been judicially doubted on both sides of the Atlantic. An English case, *Smeaton v. Ilford Corp.*,¹⁴² inquired whether a public authority is always outside the scope of strict liability, or whether it is only prima facie excluded, subject to rebuttal. In the United States, courts have said:¹⁴³ "The advantages to society of a public work are not so great as to require that private citizens suffer damage without compensation."

Judicial disapproval in England and the United States is again evident in dealing with section 522, which states that the intervention of a third person, animal, or force of nature will not exempt one from liability. In England, to take as one example, *Rickards v. Lothian*,¹⁴⁴ it was held that strict liability will not be imposed if an act of God intervenes. It also appears that courts in the United States have not been loath to ignore the section.¹⁴⁵ Here again this rejection of excuse by the Restatement is completely consistent with their risk theory of liability in this field. In fact this is expressly admitted so far as section 522 is concerned.

¹³⁹ 205 Cal. 328, 270 Pac. 952 (1928).

¹⁴⁰ 31 Cal.2d 489, 190 P.2d 1 (1938).

¹⁴¹ This embodies the common law rule on the subject. See, e.g., *Nelson v. McKenzie-Hague Co.*, 192 Minn. 180, 256 N.W. 96 (1934).

¹⁴² (1954) Ch. 450 (dictum).

¹⁴³ *Whitman Hotel Corp. v. Elliott & Watrous Eng. Co.*, 137 Conn. 562, 79 A.2d 591, 596 (1951).

¹⁴⁴ (1913) A.C. 263.

¹⁴⁵ *Cohen v. Brockton Savings Bank*, 320 Mass. 690, 71 N.E.2d 109 (1947); *Bratton v. Rudnick*, 285 Mass. 556, 186 N.E. 669 (1933).

From the above survey of Chapter 21 of the Restatement of Torts it should be clear that it is not in accord with existing law either in the United States or in England, so far as strict liability is concerned. However, it does represent a fresh attempt to break new ground by its broad formulation of principle. It is wider than English law in that it has no requirement of escape, nor is it confined to possessors of land. For this reason it has freed itself of much of the confusion with negligence and nuisance which has been such a burden.

IV. THE BASIS AND POLICY OF STRICT LIABILITY

When quasi-contract (or perhaps it should be called restitution) first appeared in the law, its anomalous position aroused much comment, for it seemed to spoil the erstwhile complacent division of civil law into "contract" and "torts." Much the same charge has been levelled at the principle of strict liability. Thus Roscoe Pound states that it should be kept in a completely separate category for the sake of coherence.¹⁴⁶ He claims that it may be put on the totally dissociated basis of the "social interest in the general security." However, we will later see that he modified this view. Again, Professor Smith¹⁴⁷ suggests that a definition of tort would become feasible if it could all be grouped under a "fault" heading. To do this, he would place in a completely separate category — under the heading of absolute liability — not only cases which have been considered as torts, but also those cases which are at present labelled "quasi-contract." The whole group would then be called "liability imposed (or created) by law." In the light of the confusion between strict liability and other torts one may agree that some form of separation is essential, but it is by no means certain that a separation from the law of tort(s) as a whole is the solution. Presuming, then, for the sake of brevity that one is confined to a framework of tortious liability, one may ask what lies behind this liability in the absence of fault?

So far as the continent of Europe is concerned, there are various ideas as to the concept of "culpa."¹⁴⁸ Savatier, in his authoritative work *Traite de la Responsibilite Civile*, suggests

¹⁴⁶ POUND, INTRODUCTION TO PHILOSOPHY OF LAW 144 (1922).

¹⁴⁷ Smith, *Tort and Absolute Liability—Suggested Changes on Classification*, 30 HARV. L. REV. 241, 254 (1916).

¹⁴⁸ *Id.* at 259. See also, Takayanagi, *Liability Without Fault in Modern Civil and Common Law* (Part I), 16 ILL. L. REV. 163, 268; (Part III), 17 ILL. L. REV. 187, 416 (1920-23).

with typical Gallic fervour that the rejection of fault liability would lead to the "moral decadence of the whole of society."¹⁴⁹ Takayanagi mentions three main schools of thought on the continent which attempt to justify strict liability. The Historical School may be dealt with very briefly, for it merely says that early Germanic law was based on such a principle. As Takayanagi rightly points out, historical fact is in itself no justification. Followers of the natural law say rather dogmatically that strict liability is a precept of natural justice. Often, the Natural Law School adds that strict liability is sound sense because of two innocent parties, the actor is more "guilty" than the person harmed. Takayanagi dismisses this because to him "there cannot be degrees of non-culpa."¹⁵⁰ But there is a "feeling" for something in such a theory which should not be lightly dismissed. While perhaps "guilt" is an inaccurate word to apply to the relative status of one who acts as opposed to one who is a passive recipient, one can see that from a viewpoint of sheer practicality it is vitally important to decide upon whom the loss should be thrown, and equally important to understand that such a decision is strongly influenced by policy considerations. Viewed in this extra-legal light there seems to be no reason why the party who has disturbed the "status quo" should not also be called upon to pay the price of stopping the disturbance. It is easy to suspect that this idea has tainted the policy of those who allow civil actions "presumptive" or "conclusive" of negligence to supplement breach of strict liability criminal statutes.

A third body of continental jurists comprise the Formalistic School. Adherents to this school say that all compensation must be based on the same legal ground. "Culpa" is not always a requisite of liability, while causation always is; therefore, causation is *the* ground of liability. Thus, strict liability is justified. The fallacy of this, says Professor Takayanagi, is that although "culpa" may not be required in some cases, it is possible that *some* other additional prerequisite besides the causation of damage (*e.g.*, ultra-hazardous activity) be present.

In England, as opposed to civil law Europe, it seems to have always been a characteristic feature of the jurisprudence to utilize rather than to analyze. Sir Henry Maine's statement that "there are some things which it is better to describe than to define" seems to have been taken much to heart and this is

149 SAVATIER, *TRAITE DE LA RESPONSABILITE CIVILE* 327 (2d ed. 1951).

150 *Id.* See also, 17 *ILL. L. REV.* at 424.

particularly true of the concept of strict liability. It has already been shown that the rule in *Rylands v. Fletcher* was so riddled with exceptions as to make people like Sir John Salmond say that there was not much left of the rule at all; and, since the decision in *Read v. Lyons*,¹⁵¹ the practical value of it seems to be so much on the wane that philosophical speculation is not likely to be further aroused. One author has made a very interesting analysis of this situation:¹⁵²

In the United States the doctrine of *Rylands v. Fletcher* from the beginning failed to win wide favor, and was never applied uniformly. Nevertheless, it appears in the Restatement of Torts under the guise of liability for "ultra-hazardous activities" and there is increasing acceptance of it in this form. It is thus a pertinent comment on legal thinking in England and the United States that as this doctrine waxes in strength in the United States it wanes in England [referring to *Read v. Lyons*]; that as the need for some principle of social insurance becomes increasingly apparent in both societies, the land where free enterprise is so strongly stressed progresses steadily toward such an idea, while in the England of the National Insurance Act . . . the judges of the highest court in the land turn their faces against it. . . .

Asked why some jurisdictions still cling to fault law, Ehrenzweig¹⁵³ has explained it in terms of the primitive but tenacious desire for revenge, which is rationalized by society in terms of fault.¹⁵⁴ He would prefer to place it on a theory of "typicality" — liability for all harm which is the "typical" result of the act in question. He states that the English rule relating to damages for breach of contract, laid down in *Hadley v. Baxendale*¹⁵⁵ by relating the foreseeability test to the time of making the contract rather than to its breach, "has made a significant contribution to the understanding . . . of non-fault liability." Although this opinion in its stress on the objective nature of typicality is fortified by the later English decision in *Victoria Laundries Ltd. v. Newman Industries*¹⁵⁶ which talks of "constructive foreseeability," the analogy is not too effective, for the rule in *Hadley v. Baxendale* in part rests upon information

¹⁵¹ [1946] 2 All E.R. 471 (H.L.).

¹⁵² Baker, *An Eclipse of Fault Liability?* 40 VA. L. REV. 273, 275 (1954).

¹⁵³ EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* 53-54 (1951).

¹⁵⁴ He thinks the real answer is to make all persons insure against liability, and to develop through that to a system of *loss* insurance, irrespective of legal liability.

¹⁵⁵ 156 Eng. Rep. 145 (Ex. 1854).

¹⁵⁶ [1949] 2 K.B. 528.

communicated by the plaintiff to the defendant,¹⁵⁷ which is peculiar to such dual relationships, and in part on damages arising in the "natural course of events," which is no clearer than the present tort rule. It seems that Ehrenzweig is forcing his argument to an extreme when he suggests that his contractual analogy is strengthened, inasmuch as one may imply a contract between the entrepreneur and the state to allow the dangerous activity. He does admit,¹⁵⁸ however, that what is typical may be a difficult question, and this seems to be the weak point of his whole interesting scheme. It is difficult to think of a complete definition of "typical" just as it is difficult to comprehensively define "foreseeable," or "with due care," or "causative factor."

Roscoe Pound says¹⁵⁹ that fault liability only has a part to play in a legal system in the early stage, "when the moral and the legal are indented"; and that the law of today is not dealing with "will" but with the "reasonable expectations [of modern society] arising out of conduct, relation and situation."¹⁶⁰ Interests lying *behind* the 19th century emphasis on rights are now the important thing. These claims are a matter of social interest and thus the end of law becomes "the satisfaction of as many human demands as we can, with the least sacrifice of other demands. This . . . we may call the socialization of law."¹⁶¹ This distinction between the old emphasis on rights and the new emphasis on interests seems sometimes to be over-fine. It might well be suggested that a "right" is merely another word for a legally recognized interest, and that, therefore, when Pound says the emphasis has shifted to interests based on reasonable expectations, all he means is that the nature of the *right* has changed from one emphasizing the individual to one emphasizing the *group*. One can see why he decries rights, however, for in many instances the word "right" has been evoked as a kind of utterly ambiguous two-edged weapon by both sides, those who attack absolute liability on the ground that it interferes with the right of the enterprising person to expand, and those who use it to defend absolute liability on the ground that it is conducive to the protection of the rights of others. One must agree with Dean

157 CHESHIRE & FIFOOT, *CONTRACTS* 492 (1953).

158 EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* 53-54 (1957).

159 POUND, *INTRODUCTION TO PHILOSOPHY OF LAW* 144 (1922).

160 *Id.* at 189.

161 Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 *HARV. L. REV.* 195, 226 (1914). For a modification of his view see, Pound, *Law in the Service State: Freedom versus Equality*, 36 *A.B.A.J.* 977 (1950).

Pound when he sees law today occupying a more positive role than formerly, in that it is trying to shape human relations as well as merely proscribing them. This "social engineering" is implicit in one court's statement some ten years ago, "even if there is no negligence, public policy demands that responsibility be fixed where it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."¹⁶²

Thus far, the more hybrid theories which do not seem to fall into any clear category have been discussed. There do appear, however, to be three considerations basic to strict liability. The first is control. Since the instrumentality is in the defendant's sole control it is up to him to take the blame if it gets out of control. It was this consideration that strongly influenced Mr. Justice Blackburn in *Rylands v. Fletcher*, and it is this thread which runs through the succeeding English cases.¹⁶³ This theory also accounts for the warped use of "res ipsa loquitur," and is expressed in decisions like *Prentiss v. National Airlines*. Furthermore, Professor Friedmann¹⁶⁴ states that as the law develops there is an increasing unity between nuisance, negligence, and *Rylands v. Fletcher* type cases, dependent on control, from which is implied foreseeability and duty. He, like Pound, thinks the extension of strict liability is due to the emphasis being placed on social situations, but unlike Pound he talks not of interests, but of duties arising from those situations. The real change seems to lie more in a stress on society rather than the individual.

The second major theory is that of risk — a lawful act or activity involving danger, undertaken at the actor's risk. This is the basis of Baron Bramwell's dissent in *Rylands v. Fletcher*, and of Section 521 of the Restatement of Torts. As one writer says:¹⁶⁵

Some activities, when carried on without negligence, are so essential that they must be carried on somewhere, yet the risk of damage may be great nevertheless. To require the actor to bear the burden of any loss he incurs without prohibiting his activity may be the most satisfactory means of balancing the social interests, and the interests of the actor and of the injured person.

The idea that there is nothing unlawful about an activity which brings absolute liability down on the head of the actor seems to

¹⁶² *Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436, 441 (1944).

¹⁶³ *Cf.*, Kelly, C.B., in *Box v. Jubb*, [1879] 4 Ex. 76.

¹⁶⁴ Friedmann, *Modern Trends in the Law of Torts*, 1 MOD. L. REV. 39 (1937).

¹⁶⁵ Carpenter, *The Doctrine of Green v. General Petroleum Corporation*, 5 SO. CAL. L. REV. 263, 271 (1932).

have had much to do with the gradual decadence of the strange theory that because "the King can do no wrong" he should also be exempted from *tort* liability. In England, the error in this was recognized by the Crown Proceedings Act of 1947,¹⁶⁶ and the Federal Torts Claims Act¹⁶⁷ permits certain tort claims to be brought against the United States government.

Finally, one may note that in lieu of strict liability, some jurisdictions apply a stringent duty of care. The outstanding weakness of this theory seems to be that if one places the standard of care too high, negligence ceases to be based on fault. In other words, this theory is perhaps more to be attacked for its detrimental effect on negligence than for its efficacy as a policy of strict liability.

In dissenting in *Chapman Chemical Co. v. Taylor*,¹⁶⁸ Smith, J. opposed strict liability because, "I can hardly see the point at which its application may logically be said to end." This is no cogent argument. The answer is that it cannot end because society, to survive, needs constant change, and legal systems must change with it or perish. In other words, just as fault is not the end, so strict liability will not be. "Yet in the course of progress we cannot wholly avoid rough classifications of conduct If the moral notion that links fault to liability must to some extent be violated, our position must not be interpreted as the abandonment of an ideal; it is but a new recognition of a human limitation from which human law cannot be free."¹⁶⁹ What this means is that while fault may be pre-eminent now, there is no need to regard strict liability, with its emphasis on the group, as socialism rearing its ugly head. Given time it seems perfectly feasible that while compensation irrespective of fault will be the order of the day, liability will be once more dependent on fault. Possibly the key to such a development which would mete out justice to both actor and sufferer is some system of comprehensive insurance. Strict liability is by no means a static concept. At present it seems to be moving toward an insurance principle, which in turn may be modified back toward a fault idea. Thus, the writer is compelled to think that the risk theory of strict liability is the most valid, and it is consistent with the insurance principle which will now be examined.

¹⁶⁶ 10 & 11 Geo. 6, c. 44 (1946-47).

¹⁶⁷ 62 STAT. 933 (1948), as amended, 28 U.S.C. § 1346 (b) (1952).

¹⁶⁸ 215 Ark. 630, 222 S.W.2d 820 (1949).

¹⁶⁹ Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954, 978 (1918).

Insurance and Strict Liability

Justice Holmes once suggested that the only alternative in a negligence case was to place the blame on one party or the other. It is now being recognized that there is a wider alternative than this — to distribute losses widely via insurance (state or otherwise) or the mechanism of the market. In other words, as Morris points out,¹⁷⁰ the risk theory has been supplemented by the important criterion that losses should only be shifted “from an inferior to a superior risk bearer.” Or as two other writers have stated the problem:

[T]here can scarcely be any doubt that the possibilities opened up by insurance for distributing losses over society, and for shielding individual defendants from the full impact of liability have been important factors in producing a climate of opinion in which extension of liability is inevitable.¹⁷¹

This statement seemingly cannot be disputed. In one instance a study was made of jury verdicts and it was found that in 3,330 automobile accident cases, 2,386 resulted in verdicts for the plaintiff. It is permissible to suggest that insurance is facilitating the adoption of strict liability in two ways. First, it is encouraging juries to extend old principles in the sure knowledge that no one is going to suffer — other than those who wish for a logical, coherent legal structure. Second, it is one of the strongest supports for those who urge the extension of expressed strict liability, for by this means those who urge the “moralizing” of law are placated by the fact that liability is seen purely in terms of everyone paying a necessary part of the “cost of production.”¹⁷² The *de facto* approach — the use of old concepts — has a number of ramifications.

In the light of the jury behaviour noted above, insurance companies will in many cases settle out of court without regard to fault, in the hope that they will come out more lightly than if they allowed the jury to come to their almost inevitable verdict. In this concealed fashion the principle of strict liability is increasingly creeping in practically, if not in theory.¹⁷³

¹⁷⁰ MORRIS, *TORTS* 248 (1953).

¹⁷¹ James & Thornton, *The Impact of Insurance on Law of Torts*, 15 *LAW AND CONTEMP. PROB.* 431, 432 (1950).

¹⁷² “The risk of injury can be insured by the manufacturer, and distributed among the public as the cost of doing business.” Traynor, J., in *Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436, 441 (1944).

¹⁷³ Gardner, *Insurance Against Tort Liability—An Approach to the Cosmology of Law*, 15 *LAW AND CONTEMP. PROB.* 455, 462 (1950).

On the other hand, the unwillingness of the courts to recognize the effect of insurance in some instances is unreal, as where they have prevented an unemancipated minor from suing his parents, or one spouse from suing another. Where there is insurance present, connubial or domestic bliss would seemingly not be impaired, and hence the rationale for the legal disability disappears.¹⁷⁴ It is interesting to note that this is being recognized in a limited number of instances. Thus, in *Dunlap v. Dunlap*¹⁷⁵ a child successfully sued his father, who was protected by liability insurance. The New Hampshire court, in finding in favor of the plaintiff, was called upon to consider the forceful statement that insurance could not create liability where none existed before. Resolving the question, the court pointed out that the question ought to be viewed more as the removal of an impairment to the enforcement of a right — in this case the removal of the threat of family discord, due to insurance. There are other cases to the same effect, both on child plaintiffs,¹⁷⁶ and spouse plaintiffs.¹⁷⁷

In *Rogers v. Butler*¹⁷⁸ the Tennessee court attacked in similar fashion the rule of governmental immunity from negligence suits. A county was held liable for the negligence of a school-bus driver for any amount up to the maximum liability insurance coverage. The court expressly based itself on the presence of such insurance. The immunity of charities have been considered in a similar fashion. In *Wendt v. Servite Fathers*¹⁷⁹ the court said, "We hold that where insurance exists, and provides a fund from which tort liability may be collected so as not to impair the trust fund, the defense of immunity is not available."¹⁸⁰

¹⁷⁴ The only justification might be that it presents an unrivaled opportunity for collusion. *Cf.*, *Newton v. Weber*, 119 Misc. 240, 196 N.Y.S. 113 (Sup. Ct. 1922), where the court talks of "a raid on the insurance company," and see generally, MADDEN, DOMESTIC RELATIONS 220-25 (1931).

¹⁷⁵ 84 N.H. 352, 150 Atl. 905 (1930).

¹⁷⁶ *Lusk v. Lusk*, 113 W.Va. 17, 166 S.E. 538 (1932); *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939); *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191 (1935); *Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929).

¹⁷⁷ *Courtney v. Courtney*, 185 Okla. 393, 87 P.2d 660 (1938); *Haglund, Tort Action Between Husband and Wife*, 27 GEO. L. J. 697, 893 (1939).

¹⁷⁸ 170 Tenn. 125, 92 S.W.2d 414 (1936).

¹⁷⁹ 332 Ill. App. 659, 76 N.E.2d 342, 349 (1947).

¹⁸⁰ *Id.* at 349. See also, *O'Connor v. Boulder Ass'n*, 105 Colo. 259, 96 P.2d 835 (1939); *Vanderbilt v. Henson*, 23 Tenn. App. 135, 127 S.W.2d 284 (1938); *Andrews v. Y.M.C.A.*, 228 Iowa 374, 284 N.W. 187 (1939).

When considerations of this sort are examined, many object to them because they believe that dependence on insurance is going to lead to conduct by the insured with little or no regard for his neighbour. Too often the whole thing is looked at solely from the position of the insured, forgetting that the insurance company has a considerable interest in reducing the number of effective damage suits. Indeed the zeal with which they pursue this policy may be such as to compel future legislators to place any comprehensive insurance scheme in the hands of the state, rather than the aggregate of private companies. The situation was highlighted in *Vance v. Burke*¹⁸¹ where the insurance company was "hot" on the lack of cooperation of the insured, while the only interest of the state was to secure financial aid to the victim. Moreover, an added difficulty of leaving it to private insurance would be the danger of being injured by one who was not insured, although in New York, insurance companies are combatting this by offering policies covering such an eventuality. Alternatively, one could compel all persons to carry compulsory liability insurance, as New York (since 1956) and Massachusetts (since 1925) have done with motor vehicle operators. This would tend to exempt persons from financial liability in negligence proceedings.

In all that has been said, the thread running through is the increasing possibilities created by the use of insurance. Recognized by courts and thinkers alike, it presents (despite some of the difficulties mentioned) new vistas for strict liability.

Whatever the fear may have been in the beginning that industry and enterprise might be overburdened with catastrophic losses, insurance has long since removed much of its sting; and where the idea of liability without fault is accepted, it is not surprising that liability in excess of fault has been gaining ground [T]he drift has been slowly but surely toward the view that unforeseeability of consequences is not in itself a sufficient reason for denying liability.¹⁸²

What is a sufficient reason remains to be discovered. Meanwhile strict liability seems to be still gathering impetus, both openly and in a variety of guises, without any indication of reversal.

¹⁸¹ 267 Mass. 394, 166 N.E. 761 (1929).

¹⁸² Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 397-98 (1950).

CONCLUSION

The whole tenor of this article has been to show that in whatever guise it appears, strict liability is on the march. Having attempted to indicate some of the ways in which it is gaining strength, it does not seem necessary in concluding to review the individual sections. In general, however, it would seem that in the light of this growth insurance may become an outstanding factor in our civil law.

While the author believes that a trend toward comprehensive insurance seems predictable, it is recognized that such a forecast is based on this author's analysis of the area covered by this article. Furthermore, opposition by the legal profession to such a tendency seems to be inevitable since then their task in the negligence field would thereby be reduced to that of mere fact finders. Indeed, legal representation will perhaps disappear in certain instances where technical investigators can do the same job with equal efficiency. In the ultimate, therefore, one can only hope that an analysis such as has been attempted here might provide some little food for thought.